ENGINEERING CONSTRUCTION (PTE.) LTD. v. OHBAYASHI-GUMI LTD.

[O.C.J. (Lai Kew Chai J.) April 23, 1985]

[Singapore – Suit No. 3297 of 1979]

Building Contract – Sub-contract – Amended Sub-contract – Intention to be bound thereby – Lack of progress in certain works – Whether plaintiffs released from responsibilities for certain works – Counterclaim – Set-off – Termination of sub-contract – Whether wrongful – Claim for work done and materials supplied – Damages – Arbitration.

The plaintiffs were the building sub-contractors of the defendants and claimed that the termination of their employment by the defendants on October 17, 1979 was wrongful. The plaintiffs therefore claimed the price of work done and materials supplied, the refund of the retention monies, damages and other consequential reliefs. The parties agreed that quantum and damages would be referred to arbitration. The defendants relied on lack of progress on the part of the plaintiffs on aluminium works to justify termination. The defendants counterclaimed a certain sum as damages and repayment of a loan of $210,000 with interest.

In 1976, the Ministry of Environment ("MOE") invited tenders for the execution of the Kim Chuan Sewage Treatment Works Stages II and III ("the said Works"). The plaintiffs offered to act as sub-contractors of the defendants and to prepare quotations. The defendants were awarded the contract by MOE at a stated price on May 6, 1977. The parties proceeded as if the said Works would be sub-contracted to the plaintiffs, save and except the Prime Cost item, and on the basis that the plaintiffs would carry out the Sub-contract works at 6.5% less than the main contract sum. The parties agreed that they would later enter into a written sub-contract. On July 4, 1977 the plaintiffs commenced work without signing any written sub-contract. On October 1, 1977 the defendants sent to the plaintiffs the draft sub-contract for which the plaintiffs suggested five amendments, three of which were accepted by the defendants. On March 14, 1979 the defendants sent the amended sub-contract (back-dated December 15, 1977) to the plaintiffs, duly signed by the defendants. The plaintiffs did not sign and return it. The learned judge found that the plaintiffs had agreed to be bound by the terms of the sub-contract and proceeded to determine question whether the plaintiffs were released from all responsibilities to complete the remaining aluminium works for Stage III. If they were so released, they were not responsible for any lack of progress.

Held: (1) the plaintiffs were, on true and natural construction of Clause 7 of the written agreement concluded with the defendants on August 29, 1979, released from seeing to the progress of the remaining aluminium works for Stage III. Accordingly, the defendants were wrong to have purported to terminate the sub-contract. The purported termination of the sub-contract for roadworks in Stage III must be declared unlawful;

(2) there will be judgment with costs for the plaintiffs for work done and materials supplied up to the date of the wrongful termination of the roadworks sub-contract. The plaintiffs were entitled to the refund of the retention monies;

(3) the defendants were entitled to set off the claims of the plaintiffs against the loan of $210,000 with interest thereon at 9% p.a. from the date of its disbursements.

CIVIL SUIT.

Cheng Tim Pin for the plaintiffs.
C. S. Wu for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J. : In this case, the plaintiffs, who had acted as the building sub-contractors of the defendants, are claiming that the termination of their employment on October 17, 1979 by the defendants was wrongful and accordingly they are claiming the price of work done and materials supplied, the refund of the retention monies, damages and other consequential reliefs. The defendants for their part relied on the unsatisfactory performance of the plaintiffs and contended that they had accepted such repudiation by their notice of termination. In the result, the defendants are counterclaiming the sum of $689,893.60 as damages for the work left undone by the plaintiffs in respect of the Stage III works. They also claim the repayment of a loan of $210,000 with interest.

In the course of the resumed hearing of the case, learned counsel for the defendants informed me that the defendants were relying solely on the lack of progress in respect of the remaining aluminium works for Stage III to justify the termination. This stand has since its adoption considerably reduced the scope of the disputes relating to the ground of the termination.

The matter arose in this way. In 1976 the Ministry of Environment ("MOE") of the Government of Singapore had invited tenders for the execution of the Kim Chuan Sewage Treatment Works Stages II and III (hereinafter referred to as "the said Works"). Stage III of the said works involved modifications of the treatment plant and although it was described as "Stage III", this stage of the said Works, which included some extensive road works (hereinafter referred to as "the roadworks"), had to be completed and commissioned before the commencement of the Stage II Works. The plaintiffs, not being eligible to tender for the said Works, towards the end of 1976 offered to act as the sub-contractor of the defendants and to prepare quotations, which included the provisional Bills of Quantities, for submission by the defendants. Much groundwork was done by both parties

and in January 1977 the defendants submitted their tender based substantially on the quotations of the plaintiffs.

On May 6, 1977 the defendants were awarded the contract by the MOE at the price of $14,319,877.45 subject, of course, to final measurements upon the practical completion of the said Works. In turn, the parties proceeded as if the said Works would be sub-contracted to the plaintiffs, save and except the Prime Cost items, and on the basis that the plaintiffs would carry out the sub-contract works at 6.5% less than the main contract sum. It was agreed that parties would later enter into a written sub-contract. On July 4, 1977 the plaintiffs commenced their work, although no written sub-contract was ever signed by the plaintiffs. As a result, the plaintiffs have maintained throughout that no concluded sub-contract was entered into.

On this aspect of the case, what had happened was this. On October 1, 1977 the defendants sent to the plaintiffs the draft sub-contract. After some three months, the plaintiffs wrote to the defendants suggesting five amendments, *viz* (1) there should be no requirement for a Performance Bond, (2) monthly progress and final payments should be made within 14 days of submission of claims, (3) the limit of the retention fund should be 2½% of the sub-contract sum, (4) profit for prime cost sum in respect of Item 441/1 in the Bills of Quantities should be increased from 0.5% to 0.568182% and (5) six specified items of work should not be subject to the deduction of 6.5%. According to the defendants' Project Manager, S. Kimishima, whose evidence on this and what followed I accept without hesitation, he informed the plaintiffs' director, K H Ng, that modifications (1), (4) and (5) were accepted by the defendants. Ng has agreed to this. On March 14, 1979 the defendants sent the duly amended sub-contract to the plaintiffs for their signature. It was signed by the defendants and it was back-dated to December 15, 1977. Although it was not signed and returned by the plaintiffs, I also accept Kimishima's evidence that Ng had orally confirmed that the terms of the sub-contract were in order. I find that at that stage, the plaintiffs had intended to agree and has in March, 1977 agreed to be bound by the terms of the sub-contract.

On the pleadings and the evidence elicited at the early stages of the trial, there was considerable controversy on the general performance and progress of the sub-contract works. In view of the fact that the issue has been narrowed to the progress of aluminium works between June 1979 and October 1979, particularly in October, 1979, I am spared the need to make any findings on the general performance of the plaintiffs.

By June 1979 the MOE had started to claim against the defendants liquidated damages for delays from June 23, 1979. By July 25, 1979 the claim for liquidated damages was $115,500. In July 1979 the plaintiffs were asking to be released from carrying out the whole of the Stage II works. By August 1979 all the Tanks in Stage III were ready to be commissioned. But the aluminium works of Stage III, in so far as they related to the installation of handrails and aluminium meshes, were not progressing satisfactorily. The sub-contractors for the aluminium works were United Central Engineering Works (S) Pte. Ltd. (hereinafter referred to as "UCE"). They were delaying because they were not paid by the plaintiffs who claimed that the defendants were wrongfully withholding payments from June 1979 onwards. On the other hand, the defendants claimed that they had overpaid the plaintiffs by some $283,564.78 and they presented through their consultant quantity surveyors, Messrs Elim A.B.H. the approximate interim final accounts as at August 16, 1979. At this stage, the outstanding items under the sub-contract which were still uncompleted were the aluminium works of Stage III, namely the installation of the balance of the handrails and the aluminium meshes, the roadworks of Stage III and the entire Stage II works which also involved aluminium works. The aluminium works in Stage III and the aluminium works in Stage II had been sub-contracted by the plaintiffs to UCE.

This was the background when the parties met on August 29, 1979 about releasing the plaintiffs from the remaining parts of the said Works. They concluded an agreement in writing which appeared in ABVI, pages 56 – 58. I bear in mind the entire document but I need to set out only clause 7 which has to be construed. Clause 7 provided:-

> "E.C. (the plaintiffs) will assign to O.G. (the defendants) Messrs United Central Engineering Works (S) Pte. Ltd. for the aluminium works which span both Stage III (New Treatment) Works and Stage II (Modification) Works of the project, on terms that United Central Engineering Pte. Ltd.'s price for that portion of the Works relating to New Treatment Works will remain E.C.'s responsibility. O.G. shall release E.C. from any further liability relating thereto. As regards the price for that portion of the works that relate to Stage II (Modification) Works, this will be O.G.'s responsibility."

The question for my determination is whether

the plaintiffs were released from all responsibilities to complete the remaining aluminium works for Stage III except as to the price thereof. If the answer is in the affirmative, obviously they could not be held responsible for any lack of progress in those works and the defendants could not therefore terminate their employment to complete the roadworks. I am of the view that the plaintiffs were on the true and natural construction of Clause 7 released from seeing to the progress of the remaining aluminium works for Stage III. Except for the pricing with regard to Stage III aluminium works for which the plaintiffs had to continue to be responsible, the aluminium works to be assigned to UCE were "the aluminium works which span both Stage III (New Treatment) Works and Stage II (Modification) Works." I cannot ignore these words and am constrained to give effect to them.

Accordingly, the defendants were wrong to have purported to terminate the contract by serving two notices on October 3, 1979 and October 17, 1979 which were based or grounded on the unsatisfactory progress of the remaining Stage III aluminium works.

If I am wrong in my interpretation of Clause 7, I go on to find that the progress of the balance of the aluminium works for Stage III was so unsatisfactory as to warrant a termintion of the sub-contract.

I now come to the reliefs claimed by the plaintiffs. Parties have agreed before me that assessment of the quantum and damages will be referred to arbitration. I declare that the defendants' purported termination of the sub-contract for the roadworks in Stage III unlawful. There will be judgment for the plaintiffs for work done and materials supplied up to the date of the wrongful termination and damages, if any, for the unlawful termination of the roadworks sub-contract. The plaintiffs are entitled to the refund of the retention monies said to be $259,471.33 which must be subject to assessment, if necessary, by the arbitrators. The defendants are, of course, entitled to set off the claims of the plaintiffs against the loan of $210,000 plus interest thereon at 9% per annum from the date of its disbursement. The defendants will have to pay the plaintiffs the costs of these proceedings.

(Court: Plaintiffs to be paid 60% of the taxed costs. Liberty to apply.)

Order accordingly.

Solicitors: *Yap & Yap; Donaldson & Burkinshaw.*

HIRENDRA LAL BANNERJI v. CHIN CHENG REALTY (PTE.) LTD.

[A.C.J. (Lai Kew Chai J.) October 9, 1985]
[Singapore – Civil Appeal No. 52 of 1982]

Practice and Procedure – Costs – Taxation – Question as to scale of costs applicable in taxation of costs which came up in August 1984 – Effect of R.S.C. (Amendment) 1982, r.11 – R.S.C. 1970, O.59 31(1), Appendix 1.

Interpretation – Construction of statutory enactment or statutory legislation – Construction according to intention expressed in legislation.

In this case three bills of costs were drawn up on the basis of the new scale of costs in Appendix 1 to Order 59 which came into operation on December 1, 1982. When the said bills of taxation came up for consideration before the Deputy Registrar, counsel for the defendants against whom the three bills of costs were raised, objected as a matter of principle and on a true and natural construction of Order 59 r.31(1) of the Rules of Supreme Court, 1970 and the 1982 Appendix 1 effective from December 1, 1982, *inter alia*, that all three bills of costs should have been drawn on the old and new scales of costs in such way as to reflect the work done before or on and after December 1, 1982. The learned Deputy Registrar agreed with the defendants and ordered that all three bills should be redrawn to reflect work done under the old and/or the new scales. The plaintiff appealed.

Held, allowing the appeal: on a true and natural construction of Order 59 r.31(1) of the R.S.C. 1970, the new scale of costs will have to be applied on a taxation of costs coming up for consideration on and after December 1, 1982 to all contentious business done on or after January 2, 1971.

Cases referred to:

(1) *The Direct United States Cable Co. Ltd.* v. *The Anglo-American Telegraph Co. Ltd.* (1877) 2 A.C. 394, 412.
(2) *Warburton* v. *Loveland* (1832) 2 D. & CL. (H.L.) 480, 489.
(3) *James Chia Shih Ching* v. *Law Society of Singapore* [1985] 2 M.L.J. 169.
(4) *Moh Seng Realty (Pte.) Ltd.* v. *H.L. Bannerji* [1985] 2 M.L.J. 341.

CIVIL APPEAL.

L.A.J. Smith for the appellant/plaintiff.
Giam Chin Toon for the respondents/defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: The taxation of the three bills of costs arose out of the following proceedings in respect of which contentious business was done before the first day of December 1982 as well as on and after that date. Under a lease dated July 23, 1957 the plaintiff as lessee was granted a lease